Office-Supreme Court, U.S.
FILED
FEB 21 1985
ALEXANDER L. STEVAS,
CLERK

(12)

No. 84-363

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,
v.
THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,
and
BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE CHASE MANHATTAN CORPORATION

Of Counsel:
L. EDWARD SHAW, JR.
KENT T. STAUFFER
THE CHASE MANHATTAN CORPORATION
1 Chase Manhattan Plaza
New York, N.Y. 10081
(212) 552-5441

JOSEPH A. CALIFANO, JR.*
GERALD M. ROSBERG
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 862-1000
Counsel for Amicus Curiae The Chase Manhattan Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

29pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amicus Curiae*	1
Summary of Argument	3
Argument	4
I. No Federal Statute Authorizes This Unprecedented Affront to Fundamental Constitutional Principles	7
II. The Massachusetts and Connecticut Acts Violate the Commerce Clause	14
III. The Massachusetts and Connecticut Acts Violate the Compact Clause	18
A. Interference With Federal Regulatory Authority	20
B. Aggrandizement of State Power at the Expense of Other States	22
Conclusion	24

TABLE OF AUTHORITIES

CASES Page

Baldwin v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) 4, 16, 18
Barron v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833) .. 8
City of Philadelphia v. *New Jersey*, 437 U.S. 617 (1978) 15, 17
Cuyler v. *Adams*, 449 U.S. 433 (1981) 19
Dean Milk Co. v. *Madison*, 340 U.S. 349 (1951) 18
Florida v. *Georgia*, 58 U.S. (17 How.) 478 (1855) 6, 22
Ford v. *Surget*, 97 U.S. 594 (1878) 8
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 6, 7
Great Atlantic & Pacific Tea Co. v. *Cottrell*, 424 U.S. 366 (1976) 17, 18
H.P. Hood & Sons, Inc. v. *DuMond*, 336 U.S. 525 (1949) 16, 18
Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980) 10, 11, 15, 20
Milk Control Board v. *Eisenberg Farm Products*, 306 U.S. 346 (1939) 17
New England Power Co. v. *New Hampshire*, 455 U.S. 331 (1982) 8, 9
Pike v. *Bruce Church, Inc.*, 397 U.S. 137 (1970) .. 15
Rhode Island v. *Massachusetts*, 37 U.S. (12 Pet.) 657 (1838) 23
South Carolina State Highway Dep't v. *Barnwell Bros.*, 303 U.S. 177 (1938) 16
South-Central Timber Development, Inc. v. *Wunnicke*, 104 S. Ct. 2237 (1984) 8, 9
Southern Pacific Co. v. *Arizona*, 325 U.S. 761 (1945) 16
United States Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 8, 19, 20, 23
United States v. *O'Neill*, 359 U.S. 1 (1959) 23
United States v. *Tobin*, 195 F. Supp. 588 (D.D.C. 1961) 23
Virginia v. *Tennessee*, 148 U.S. 503 (1893) 19, 20
Williams v. *Bruffy*, 96 U.S. 176 (1877) 8

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS — Page

U.S. Const. Art. I, § 8 6
U.S. Const. Art. I, § 10, cl. 1 6
U.S. Const. Art. I, § 10, cl. 3 8
Bank Holding Company Act of 1956:
12 U.S.C. § 1841 *et seq.* 10
12 U.S.C. § 1842(a) 20
12 U.S.C. § 1842(c) 21
12 U.S.C. § 1842(d) 7, 10, 20
McCarran-Ferguson Act:
15 U.S.C. § 1011 10

LEGISLATIVE HISTORY

130 Cong. Rec. H10005 (daily ed., Sept. 24, 1984) .. 13
Conn. Senate Debate (May 18, 1983) 2
H.R. 15, 99th Cong., 1st Sess. (1985) 14
H.R. 52, 99th Cong., 1st Sess. (1985) 14
H.R. 2431, 98th Cong., 1st Sess. (1983) 13
S. 1002, 98th Cong., 1st Sess. (1983) 13
S. 2851, 98th Cong., 2d Sess. (1984) 13

OTHER

Comment, *Regional Banking Statutes and the Equal Protection Clause*, 84 Colum. L. Rev. 2025 (1984) 8
The Federalist Papers (Rossiter ed. 1961) 5
Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685 (1926) 22
Letter from James Madison to George Washington (Apr. 16, 1787), *quoted in* 1 Beveridge, *The Life of John Marshall* 312 (1916) 6
Letter from Peter W. Rodino, Chairman, House Committee on the Judiciary, to Thomas P. O'Neill, Jr., Speaker of the House (Sept. 14, 1984) 13, 14
New York Times, April 3, 1983 2

TABLE OF AUTHORITIES—Continued

Page

Panelists Predict Bigger Regions Following Regional Banking Compacts, 42 Washington Financial Rep. (BNA) 1081 (June 25, 1984) 2

Warren, *The Supreme Court in United States History* (1922) 6

Washington, Farewell Address (Sept. 19, 1796) *quoted in The World's Great Speeches* (3d ed. 1973) 5

G. Wills, *Cincinnatus—George Washington and the Enlightenment* (1984) 5

F. Zimmermann and M. Wendell, *The Law and Use of Interstate Compacts* (1961) 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-363

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

and

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF AMICUS CURIAE OF THE CHASE MANHATTAN CORPORATION

INTEREST OF AMICUS CURIAE

The Chase Manhattan Corporation is a bank holding company with its principal place of business in New York. Operating through The Chase Manhattan Bank, N.A., and other subsidiaries, it provides financial services to individuals, corporations and governmental entities

throughout the United States and in more than 100 other countries.

Chase Manhattan's non-bank financial services subsidiaries are present and maintain offices in nearly twenty states, including Massachusetts and Connecticut.[1] These non-bank subsidiaries offer some services that compete directly with those of intervenor-respondents and other financial institutions based in New England. Nevertheless, the regional banking compact upheld by the court below bars Chase Manhattan and its subsidiaries from competing on an equal footing simply because Chase Manhattan is headquartered outside New England.[2]

Given the importance of the questions presented and the dangers inherent in the Balkanization of the nation's banking system, Chase Manhattan submits this brief in support of petitioners. All parties have consented to the filing of this brief *amicus curiae*, and the written consents have been filed with the Clerk of the Court.

---

[1] Chase Commercial Corporation, which provides asset-based lending and equipment lease financing, has offices in Boston and Canton, Massachusetts. Chase Home Mortgage Corporation engages in mortgage banking at offices in Boston and Waltham, Massachusetts. Chase National Corporate Services, Inc. has regional marketing offices in Stamford, Connecticut, and Boston, Massachusetts, that promote Chase's commercial lending and other services. Chase Manhattan Financial Services, Inc. provides consumer and small business financial services and trust representative services at an office in Greenwich, Connecticut.

[2] Sponsors of the Compact have made no secret of its principal target: the major New York money center banks, including Chase Manhattan. The Massachusetts act's sponsor, Senator John Brennan, has stated that the act is to prevent entry of "big money center banks." N.Y. Times, April 3, 1983 (*see* Pet. App. A189). *See also* Conn. Senate Debate (May 18, 1983) (statement of Senator Sullivan) (Pet. App. A159); *Panelists Predict Bigger Regions Following Regional Banking Compacts*, 42 Washington Financial Rep. (BNA) 1081 (June 25, 1984) ("money-center banks in New York, California, and Illinois" are excluded from regional compacts).

SUMMARY OF ARGUMENT

The New England Compact is an unprecedented and avowedly protectionist scheme intended to secure benefits for certain interests in one section of the country at the expense of residents of other states. The inevitable effect of this concerted boycott is to invite reprisal and nurture a sectionalism so dangerous that the Framers of the Constitution established constitutional protections to guard against it.

No federal statute authorizes this affront to fundamental constitutional principles. The Douglas Amendment to the Bank Holding Company Act of 1956, on which the court below and the Federal Reserve Board relied, stops far short of authorizing the New England Compact, even by implication. The Douglas Amendment permits the states to lift the general federal prohibition on the acquisition of a bank by a bank holding company in another state. But the Amendment neither states nor suggests that Congress intended to free the states from all constitutional constraints on the manner in which they exercise that authority.

At least in the absence of clear congressional authorization, the New England Compact cannot pass muster under the Commerce or Compact Clauses of the Constitution. The Massachusetts and Connecticut statutes discriminate against out-of-state bank holding companies solely by reference to their state of origin. They are, therefore, *per se* unlawful under the Commerce Clause. They also violate the Compact Clause because they constitute a compact to which Congress has concededly not consented. Unlike compacts that have been held not to require congressional consent, the New England Compact has a substantial impact on the nation's federal structure. First, in an area of pervasive federal regulation, the Compact enables its members to accomplish a result through concerted action that no one of them could have achieved on its own. Second, the Compact redounds to

the benefit of a particular group of states and to the harm of others. As a result, the absence of congressional consent is fatal to the Massachusetts and Connecticut acts before the Court.

ARGUMENT

The New England Compact at issue in this case is without precedent in our constitutional history.[3] To be sure, this Court has had experience enough with protectionist schemes intended, as this one plainly is, to secure a benefit for certain local interests at the expense of outsiders. But the problem presented here is twice compounded. First, the Massachusetts and Connecticut acts at issue in this case distinguish among the residents of other states *explicitly on the basis of their state of origin.* Connecticut, for example, opens its door to residents of Massachusetts, Maine, New Hampshire, Vermont and Rhode Island, but it excludes the residents of New York, New Jersey, Pennsylvania and the rest. It is hard to imagine a more direct repudiation of the principle that "the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[4] Second, Massachusetts and Connecticut have *acted in concert*, exacerbating the effects of their discriminatory arrangement and creating even greater opportunity for disharmony among the states, sectional rivalry, and reprisal.

From their experience under the Articles of Confederation, the Framers of the Constitution were all too familiar with the dangers of interstate rivalry and sectional-

---

[3] As *amicus* noted in its brief in support of the petition for writ of certiorari, numerous other states have established or considered establishment of exclusionary regional banking blocs based on the New England model. Thus, while the New England Compact is the first step down this road, there is no doubt that it will be followed by many others if the decision of the court below is sustained by this Court.

[4] *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

ism.[5] In his Farewell Address, President Washington warned against the temptation to subdivide the nation into regions defined by reference to some perceived common core of mutual interest:

> ". . . it is of infinite moment that you should properly estimate the immense value of your national union . . . indignantly frowning upon the first dawning of every attempt to alienate any portion of our country from the rest . . . ."
>
> * * *
>
> "In contemplating the causes which may disturb our union, it occurs, as a matter of serious concern, that any ground should have been furnished for characterizing parties by geographical discriminations—Northern and Southern, Atlantic and Western—whence designing men may endeavor to excite a belief that there is a real difference of local interests and views." [6]

Numerous clauses of the Constitution give evidence of the Framers' determination to promote harmonious relations among the states and achieve the economic benefits

---

[5] *See e.g.*, Hamilton's vivid warning against the evil of alliances or confederacies of states arrayed against each other, in *The Federalist Papers*, No. 7 at 62-63 (Rossiter ed. 1961).

[6] Washington, Farewell Address, Sept. 19, 1796, *quoted in The World's Great Speeches* 250-51 (3d ed. 1973). *See also* G. Wills, *Cincinnatus—George Washington and the Enlightenment* 89 (1984):

> "Even in 1792, when Washington had Madison draft (from dictated notes) the earliest form of the Farewell Address, he warned against sectionalism and division. This was the great danger to the vision Washington had for his country. . . . At the end of the war he wrote: 'I think the blood and treasure which has been spent in it has been lavished to little purpose, unless we can be better Cemented [a favorite term] . . . When the band of Union gets once broken, everything ruinous to our future prospects is to be apprehended.' "

(square brackets in original) (citation omitted).

of a national common market, free of internal trade barriers. Two of these clauses are pertinent here: the Compact Clause [7] and the Commerce Clause.[8]

In a boundary dispute case decided more than 100 years ago, this Court described the purpose of the Compact Clause:

> "This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others. And the right and the duty to protect these interests is vested in the general government." [9]

Similar concerns about evenhandedness and non-discrimination undergird much of the analysis under the Commerce Clause. Indeed, the Commerce Clause was adopted in large measure to deprive the states of the power "to harass each other with rival and spiteful measures dictated by mistaken views of interest." [10] The New

---

[7] Art. I, § 10, cl. 3 provides, "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."

[8] Art. I, § 8 grants to Congress the power to "regulate Commerce . . . among the several States . . . ."

[9] *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855).

[10] Letter from James Madison to George Washington, April 16, 1787, *quoted in* 1 Beveridge, *The Life of John Marshall* 312 (1916). The Commerce Clause presents one of the greater ironies of this case. In *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), a seminal Commerce Clause decision, the Court broke up New York's stranglehold on shipping by steamship in the Hudson Valley and Long Island Sound, which operated to the detriment of citizens of many other states. After the decision, there was literal rejoicing up and down the East Coast, not least in New England. Yet far from hurting New York, the emergence of free trade in interstate shipping "was the most potent factor in the building up of New York as a commercial center." Warren, *The Supreme Court in United States History* 76 (1922). Now, with a misguided, jealous and discriminatory view of their self-interest, the states that were the primary beneficiaries of this Court's decision in *Gibbons* have enacted leg-

England Compact strikes at the heart of these long-established principles.

I. NO FEDERAL STATUTE AUTHORIZES THIS UNPRECEDENTED AFFRONT TO FUNDAMENTAL CONSTITUTIONAL PRINCIPLES.

Since it is essentially conceded that the Compact cannot withstand constitutional scrutiny under either the Commerce or Compact Clauses in the absence of congressional authorization,[11] the central question now before this Court is one of statutory interpretation. The court below and the Federal Reserve upheld the New England Compact because they found that Congress had impliedly authorized it in the Douglas Amendment to the Bank Holding Company Act of 1956, 12 U.S.C. § 1842 (d). Given the primary importance of the statutory question, *amicus* will consider first whether the Douglas Amendment does, in fact, authorize this avowedly discriminatory interstate arrangement,[12] and then turn to the analysis under the Commerce and Compact Clauses.

---

islation boycotting the rest of the country—with special emphasis on New York. *Gibbons* teaches that Balkanization of trade is constitutionally unacceptable. Our history teaches that the path to a sound economy lies in trade free of such discrimination.

[11] *See* Brief for the Federal Respondent in Opposition at 5 ("In the absence of congressional authorization, there is little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause"). The Federal Reserve Board noted that "[a]bsent congressional authorization of [the Connecticut statute] in the Douglas Amendment, it appears that [the statute] would be inconsistent with the standards for state action under the Commerce Clause . . . ." (Pet. App. A55). Similarly, the Board rejected the Compact Clause attack, despite its recognition that the Massachusetts and Connecticut Acts constitute a "compact," (Pet. App. A51-52), on the theory that the Douglas Amendment so completely renounces federal interest in the terms and conditions under which interstate bank consolidations can take place as to obviate any need for congressional consent. (Pet. App. A52).

[12] Whether Congress even has the *authority* to permit an arrangement of this kind is a question of first impression that this

Considering the admittedly protectionist purpose and effect of the New England Compact and the total absence of any constitutional precedent for such a scheme, one would suppose that the statute relied on by the Board and court below must speak with remarkable clarity on this point. In fact, the Douglas Amendment stops far short of authorizing the New England Compact, even by implication.

1. This Court has repeatedly held that congressional authorization can save a statute otherwise invalid under the Commerce Clause only where congressional intent is "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, 104 S. Ct. 2237 (1984). That requirement serves a dual purpose. First, it eliminates doubt about what Congress really intended. As the Court has explained:

> "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, . . . we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.'"

Court need not reach, given the abundant evidence that Congress has not authorized anything like the New England Compact. The question of congressional power is not, in any event, without difficulty. *See* Comment, *Regional Banking Statutes and the Equal Protection Clause*, 84 Colum. L. Rev. 2025 (1984) (reasoning that discriminatory regional banking statutes violate the Equal Protection Clause and that Congress has no power to authorize them). It could also be argued that the New England Compact is a "Treaty, Alliance or Confederation" within the meaning of Art. I, § 10, cl. 1, because it encroaches upon the power of sister states. *See Ford* v. *Surget*, 97 U.S. 594, 603 (1878); *Williams* v. *Bruffy*, 96 U.S. 176, 183 (1877); *cf. United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 466-67 n.18 (1978) (quoting *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243, 248 (1833)). Unlike a "compact," to which Congress can consent under art. I, § 10, cl. 3, a "Treaty, Alliance or Confederation" is unconstitutional with or without congressional authorization.

New England Power Co. v. *New Hampshire*, 455 U.S. 331, 343 (1982). Second, the clear-statement requirement assures that all potentially affected interests have fair notice and an opportunity to participate in the resolution of the issue through the political process. As this Court stated last Term,

> "[W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce."

South-Central Timber Development, Inc. v. *Wunnicke*, 104 S. Ct. at 2243.

Both of these concerns are implicated here. There is substantial reason to doubt that Congress had anything at all "in mind" on the subject of exclusionary regional compacts, since nothing like the New England Compact was even remotely in contemplation when Congress enacted the Douglas Amendment. By the same token, it is hard to see how Congress could have reached a "collective decision" to allow a group of states to establish a concerted boycott directed at other states when no one had the slightest reason to suppose that such a proposal was even on the table.[13]

2. The Douglas Amendment does not even purport to confer plenary regulatory authority on the states.[14]

---

[13] The Federal Reserve Board was more candid than the court below about the difficulty of finding unmistakable evidence that the Douglas Amendment was intended to authorize the New England Compact. It noted that the Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court." (Pet. App. A65).

[14] This Court has previously contrasted the Douglas Amendment with section 7 of the Bank Holding Company Act, a provision not at issue here, in these terms:

Rather, it constitutes a limitation on the power of the Federal Reserve Board to approve acquisitions under the Bank Holding Company Act of 1956, 12 U.S.C. § 1841 *et seq.* The Amendment prohibits the Board from approving an application under which a bank holding company or any of its subsidiaries would acquire a bank located in another state unless the acquisition is "specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d)(1).[15]

"In contrast to § 3(d) [the Douglas Amendment], § 7 of the Act *does* reserve to the States a general power to enact regulations applicable to bank holding companies."

Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27, 48 (1980) (emphasis added). Congress is fully capable of conferring plenary regulatory authority on the states when it wants to, as the McCarran-Ferguson Act illustrates:

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose *any* barrier to the regulation or taxation of such business by the several States."

15 U.S.C. § 1011 (emphasis added).

[15] The full text of the Amendment is as follows:

"Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act [12 U.S.C. § 1823(f)]) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, *unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely*

As this Court has previously explained,

> "it is doubtful that [the Douglas Amendment] authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."

Lewis v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980) (emphasis in original).

By its own terms the Douglas Amendment refutes the contention that Congress has unmistakably authorized the New England Compact. The Amendment says nothing whatsoever about regional banking or the power of a single state, let alone a group of states acting in concert, to discriminate among out-of-state bank holding companies solely on the basis of their state of origin. As respondents would have it, when Congress granted the states authority to make exceptions to the general federal prohibition on interstate acquisitions, it *must* have intended to remove (to whatever extent it had power to do so) all constitutional constraints on the manner in which a state might exercise that authority. On their reading of the Amendment, the grant of authority to make an exception necessarily carries with it the authority to draw any line whatsoever, no matter how arbitrary or blatantly discriminatory, no matter that it flouts well established and otherwise applicable con-

---

by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest." (Emphasis added.)

stitutional principles bearing on interstate relations and the proper functioning of the federal system. In fact, that "reading" of the Amendment makes no sense as a matter of logic or common sense, and it finds not one iota of support in the language of the Amendment.[16]

3. Contrary to the conclusion of the court below (Pet. App. A29), the Federal Reserve Board's interpretation of the Douglas Amendment is entitled to no special deference. First, the Board conceded that it had no expertise regarding the constitutional issues raised by this case. (Pet. App. A41). Second, the Board was equivocal at best in its findings on the language and legislative history of the Douglas Amendment.[17] Third, the Board did not even purport to exercise its presumed administrative expertise in construing the Douglas Amendment. On the contrary, it specifically declined to comment on the "desirability, as a matter of national policy, of the regional arrangements" supposedly authorized by the Douglas Amendment, and it stated that "the public policy issues that are raised by the regional approach are inherently national and would be best resolved by Congressional action." (Pet. App. A47-48). Finally, the Board's own chairman has called into question the validity of the Board's conclusion, stating that the Board perceives "seri-

---

[16] The Federal Reserve conceded that the Amendment "does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states having reciprocal laws, but against all other states." (Pet. App. A65) (emphasis in original). Moreover, the fragmentary legislative history of the Douglas Amendment provides no reason to believe that Congress intended to confer on the states a broad immunity from the constitutional principles that ordinarily limit the exercise of state power. As the Board noted, the Amendment was "proposed during the debate on the Senate floor and there is no committee or other significant legislative history to clarify its meaning." (Pet. App. A66).

[17] *See* notes 13, 16 *supra*.

ous questions both about the constitutionality of such arrangements [regional banking compacts] and their implications for public policy." (Pet. App. A199). Under these circumstances, this Court owes no deference to the Board in construing the Douglas Amendment.

4. Proponents of the New England Compact and similar multistate banking schemes have made vigorous (but so far unsuccessful) attempts to obtain express congressional approval,[18] effectively acknowledging that the Douglas Amendment does not provide the necessary authorization. Their efforts in the last session of Congress came to naught when Representative Fernand J. St Germain, Chairman of the House Banking Committee, declared that regional banking compacts "raise significant constitutional questions" and served notice that his Committee would not take up the issue in the closing hours of the session.[19] House Judiciary Committee Chairman Rodino noted that his Committee would have to hold hearings on any legislation to authorize regional banking compacts, and he explained that

> "[i]t is possible, even likely, that regional banking compacts designed to promote the interests of certain banks within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause . . . ." [20]

---

[18] *See, e.g.*, H.R. 2431, 98th Cong., 1st Sess. (1983) (introduced by Rep. Frank); S. 1002, 98th Cong., 1st Sess. (1983) (introduced by Sen. Tsongas). A provision authorizing regional banking was included in an omnibus banking bill, the Financial Services Competitive Equity Act, S. 2851, 98th Cong., 2d Sess. (1984), that passed the Senate on September 13, 1984, but the bill died at the end of that session of Congress for want of action by the House.

[19] 130 Cong. Rec. H10005 (daily ed., Sept. 24, 1984).

[20] Letter from Peter W. Rodino, Chairman, House Comm. on the Judiciary, to House Speaker Thomas P. O'Neill, Jr., Sept. 14, 1984, reproduced in the Appendix to the Brief Amicus Curiae of The Chase Manhattan Corporation in Support of the Petition for Writ of Certiorari.

Chairman Rodino also pointed out that Congress disfavors the pre-authorization of compacts and would not grant blanket approval in advance without the most careful deliberation:

> "Typically, compacts are negotiated and agreed to by the States and then submitted to the Congress for careful review and approval. . . . While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences."[21]

Again in this session of Congress proponents of regional banking compacts have introduced legislation to authorize these unprecedented arrangements.[22]

5. The New England Compact has spawned a host of rival banking coalitions that threaten to remake the structure of the nation's banking industry. The public policy questions raised by this momentous development, which are undeniably of national proportions, could hardly have been anticipated by Congress 30 years ago when it passed the Douglas Amendment. Now, with compact proponents seeking express congressional authorization, Congress can face these questions squarely and make a collective decision, with all affected interests represented, as to whether this new development serves or disserves the interests of the nation as a whole. No attempt, however ingenious, to pour unintended meaning into the Douglas Amendment can change the fact that Congress has not yet made any such decision.

II. THE MASSACHUSETTS AND CONNECTICUT ACTS VIOLATE THE COMMERCE CLAUSE.

Stripped of their non-existent statutory authorization, the Massachusetts and Connecticut Acts must be con-

---

[21] *Id.*

[22] *See* H.R. 15, 99th Cong., 1st Sess. (1985) (introduced by Rep. Wylie); H.R. 52, 99th Cong., 1st Sess. (1985) (introduced by Rep. Barnard).

demned under long-established principles of Commerce Clause adjudication.

1. The Massachusetts and Connecticut Acts discriminate against out-of-state bank holding companies solely by reference to their state of origin. These Acts are paradigms of the overtly protectionist legislation repeatedly struck down by this court as *per se* violations of the Commerce Clause.[23]

2. Even assuming *arguendo* that the Massachusetts and Connecticut statutes were enacted to promote some colorably legitimate state purpose—and the record below makes clear that they were not—the statutes would nevertheless violate the Commerce Clause. This Court has held that state statutes affecting interstate commerce will be upheld "[w]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." [24] The statutes at issue here make a mockery of "evenhanded" regulation—they explicitly distinguish between interstate and intrastate transactions and compound the problem by distinguishing among nonresidents on the basis of their state of origin. Moreover, the effects on interstate commerce can hardly be described as "incidental." The very purpose of the statutes is to address the competitive balance between financial institutions inside and outside the protected region, and the means chosen is a prohibition on a broad class of interstate transactions.

---

[23] *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978).

[24] *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

This Court has identified an economic [25] and a political [26] element underlying the Commerce Clause. The Massachusetts and Connecticut statutes offend both. Economically, they create a new regional banking market from which out-of-region banks are excluded. Politically, they impose the burdens of the legislation squarely on persons excluded from the Compact states' political processes.

3. The Court below stated that the Massachusetts and Connecticut acts at issue here "would appear to promote interstate commerce rather than restrict it" because "[w]ithout these statutes no out-of-state bank holding companies could acquire Massachusetts or Connecticut banks." (Pet. App. A29). That reasoning cannot save these statutes from condemnation under the Commerce Clause.

In the first place, the validity of a state statute whose very purpose is to "suppress or mitigate the consequences of competition between the states" [27] cannot be deter-

---

[25] *See H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 537-38 (1949):

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has its corollary that the states are not separable economic units. As the Court said in [*Baldwin v. G.A.F. Seelig Inc.*, 294 U.S. 511, 527 (1935)], 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.'"

[26] Thus, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subject to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *South Carolina State Highway Dep't* v. *Barnwell Bros*, 303 U.S. 177, 185 n.2 (1938). *See also Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 767-68 n.2 (1945).

[27] *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935).

mined by reference to nice calculations of the number of interstate transactions likely to occur with and without the challenged statute. The Massachusetts and Connecticut acts are offensive to the most basic principles underlying the Commerce Clause: they discriminate against interstate commerce generally, and in particular against the residents of certain disfavored states. As this Court has recognized in describing the purpose of the Commerce Clause,

> "The United States could not exist as a nation if each of them were to have the power to forbid imports from another state, to sanction the rights of citizens to transport their goods interstate, or to *discriminate as between neighboring states* in admitting articles produced therein." [28]

In *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), this Court pointed out that

> "whatever New Jersey's ultimate purpose, it may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, *apart from their origin*, to treat them differently."

437 U.S. at 626 (emphasis added). Here, Massachusetts and Connecticut have not even purported to explain what it is about bank holding companies from New York or Missouri or Idaho—apart from their origin—that makes them undeserving of the same benefits they freely accord to bank holding companies from other New England states.[29]

---

[28] *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939) (emphasis added).

[29] In *Great Atlantic & Pacific Tea Company* v. *Cottrell*, 424 U.S. 366 (1976), the Court rejected the contention that a restriction on interstate commerce was valid because it would have the net effect of increasing the amount of such commerce. At issue was a Mississippi regulation excluding Louisiana milk because Louisiana was

In any event, there is considerable room for doubt about what would happen "[w]ithout these statutes." (Pet. App. A29). The court below jumped quickly and uncritically to the conclusion that there would be more interstate acquisitions *with* the Massachusetts and Connecticut statutes than *without* them. But that conclusion rests on a decidedly uncertain factual premise—namely, that Massachusetts and Connecticut would allow no interstate acquisitions at all if forbidden to impose blatantly discriminatory conditions on such acquisitions. In fact, one might as plausibly assume that Massachusetts and Connecticut, along with many other states now considering legislation in this area, would authorize interstate acquisitions on some nondiscriminatory basis. Given the absence of any evidence in the record one way or another on this point, the court below had no basis for its conclusion that the challenged statutes "would appear to promote interstate commerce rather than restrict it."

III. THE MASSACHUSETTS AND CONNECTICUT ACTS VIOLATE THE COMPACT CLAUSE.

Application of the Compact Clause depends upon a finding that (1) two or more states have entered into a com-

---

not prepared to accept Mississippi milk on a reciprocal basis. Referring to the broad purposes of the Commerce Clause, the Court rejected Mississippi's contention that its mandatory (though nondiscriminatory) reciprocity requirement would actually facilitate the free flow of commerce by helping Mississippi producers gain access to the Louisiana market. 424 U.S. at 378-81. The Court noted that Mississippi's approach "would plainly 'invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause,'" 424 U.S. at 380 (quoting *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 356 (1951)), and it added that "[n]o 'parochial legislative polic[y],' . . . could be more precisely calculated to open 'the door . . . to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation,'" 424 U.S. at 380 (quoting *H.P. Hood & Sons, Inc.* v. *DuMond*, 336 U.S. 525, 538 (1949), and *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935)).

pact; (2) the compact is of a type that requires congressional consent; and (3) Congress has not consented.[30]

The first and third factors present no difficulty in this case. A compact need not be explicit or in writing,[31] and compacts frequently are expressed in reciprocal legislation.[32] Given the legislative history of the New England compact, which shows an unmistakable intention on the part of Massachusetts and Connecticut to act in concert, the court below and the Board had no difficulty concluding that their reciprocal statutes constitute an interstate compact. (Pet. App. A32, A51-A52).

Nor can there be any doubt concerning the absence of congressional "consent" to the compact at bar.[33] Whatever the Douglas Amendment means, it surely does not constitute consent within the meaning of the Compact Clause. It makes no reference to multistate action of any kind, and the debate surrounding its enactment contains no scrap of evidence to suggest that Congress intended by its passage to pre-authorize a breed of compact that no one had yet thought to propose.

The issue before this Court, therefore, is whether the New England Compact is the type of "Agreement or Compact" that is necessarily invalid (whatever its other infirmities) in the absence of congressional consent. This Court has noted that the Compact Clause requires congressional consent for agreements between states that tend "to increase the political power in the States, which

---

[30] *Cuyler* v. *Adams*, 449 U.S. 433, 439-40 (1981).

[31] *Virginia* v. *Tennessee*, 148 U.S. 503, 517-18 (1893).

[32] *See United States Steel Corporation* v. *Multistate Tax Commission*, 434 U.S. 452, 469-70 (1978).

[33] The Board noted that "in form" the New England Compact was a "compact or agreement that has never been approved or authorized by Congress." It then proceeded to argue that no consent was necessary. (Pet. App. A52).

may encroach upon or interfere with the just supremacy of the United States." [34] "The relevant inquiry," the Court has explained, "must be one of impact on our federal structure." [35]

The court below offered neither reason nor citation in support of its one-sentence conclusion that the New England banking compact would not "in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States." (Pet. App. A32). In fact, the Compact will have precisely that effect in at least two distinct ways. First, it intrudes upon the pervasive federal regulation of interstate banking. Second, it aggrandizes the power of Compact states to the detriment of their sister states.

A. Interference With Federal Regulatory Authority.

The Federal Reserve Board and the court below maintained that the New England Compact could not encroach upon federal regulatory authority in the area of interstate banking because Congress renounced that authority in the Douglas Amendment. (Pet. App. A29, A52). That position rests on a fundamental misapprehension of the language, history and purpose of the Douglas Amendment and ignores the federal government's pervasive regulation of interstate banking.[36]

1. As this very litigation illustrates, the Bank Holding Company Act permits a bank holding company to acquire a bank in another state only with the approval of a federal agency: the Federal Reserve Board. The Board tests such acquisitions under federal standards.[37]

---

[34] *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893).

[35] *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. at 471.

[36] *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980).

[37] *See* 12 U.S.C. §§ 1842(a) and (d). The Board's criteria for approving such acquisitions indicate the pervasive nature of the

Out of deference to state concerns, the Douglas Amendment provides that an acquisition is *not* permitted unless, among other conditions, it is specifically authorized by the law of the state in which the acquired bank is located. That hardly suggests federal indifference to the conditions under which such acquisitions *do* take place.

2. In setting federal policy in this area, Congress has declined to give express approval to regional banking. Yet Connecticut and Massachusetts now seek to accomplish what Congress has declined to do. Through their joint action these states would bring about a result that neither could have achieved on its own. The success of the action taken depends upon the cooperation and reciprocal action of a neighboring state.

Thus, the agreement at issue in this case is critically different from the one before the Court in *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978), where the Court held that the Multistate Tax Compact was valid without congressional consent. There, the Court rejected four separate contentions that the Compact aggrandized state power, noting that the member states could have exercised essentially the same power on their own authority. 434 U.S. at 473-76.[38] By contrast, the Massachusetts and Connecticut Acts do not merely establish parallel rules to govern the relationship of those states with the country as a whole. The Acts treat *participating* states differently from the rest of the country. This differential, brought about by agreement and not

---

federal government's interest and regulatory control. The Board must assess potential anticompetitive effects of acquisitions, and it may approve an anticompetitive acquisition only if in the "public interest." 12 U.S.C. § 1842(c). The Board must further evaluate the involved banks' financial and managerial resources and the needs of the relevant communities. *Id.*

[38] The Multistate Tax Compact is distinguishable in a second major respect, noted at pages 23-24 *infra*.

simply by parallel action, is the very reason-for-being of the arrangement.

3. It is surely no answer to say, as did the court below, that Congress can adequately protect its interests by subsequently enacting legislation to restore the status quo. (Pet. App. A32). That reasoning stands the Compact Clause on its head. The plain intention of the Framers was to put the burden of obtaining congressional approval on the states that seek to establish a compact, not to make the opponents of a compact—including Congress itself—initiate action to disapprove it.[39]

B. Aggrandizement of State Power at the Expense of Other States.

The New England Compact encroaches on the supremacy of the United States in a second sense: It seeks to aggrandize the power of Compact states at the expense of their sister states.

1. It is in large part because compacts "may affect the interest of States other than those parties to the agreement . . . [that] Congress must exercise national supervision through its power to grant or withhold consent . . . ." [40] The Compact Clause serves to protect "the rights and interests of other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others." [41] It is designed to "guard against the derangement of [a

---

[39] "The real test of the need for Congressional consent in the present day is the degree to which an interstate agreement *may* conflict with federal law or federal interests. If it runs any danger of conflict with federal law . . . the need for Congressional consent is clearly indicated."
F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* 23 (1961) (emphasis supplied).

[40] Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L.J. 685, 694-95 (1926).

[41] *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855).

state's] federal relations with the other States of the Union, *and* the federal government." [42]

2. As the Federal Reserve Board itself acknowledged, "[w]hile there are judicial decisions upholding interstate agreements, *these agreements have not had the objective of discrimination* but rather that of cooperation on a subject matter of exclusive interest to the states that are parties to these agreements." (Pet. App. A50 n.5) (emphasis added).

3. In *United States Steel Corp.* v. *Multistate Tax Commission*, this Court implicitly recognized that a compact enlarging the power of some states at the expense of others can adversely affect the federal structure and trigger the requirement of congressional consent. Those who challenged the Compact alleged that it would impair the sovereign rights of non-member states. 434 U.S. at 477. The Court did not dismiss the contention as irrelevant to Compact Clause analysis, but rejected it on the basis of a finding that the Compact did not, in fact, "redound to the benefit of any particular group of States or to the harm of others." *Id.*[43]

The Multistate Tax Compact was open on a nondiscriminatory basis to any state that wished to join. By contrast, the regional banking compact at issue in this

---

[42] *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (emphasis supplied). *See also United States* v. *Tobin*, 195 F. Supp. 588, 606 (D.D.C. 1961) (under the Compact Clause "Congress has a two-fold duty: . . . to prevent undue injury to the interests of non-compacting states" and to protect the interests of the federal government) (citations omitted).

[43] Moreover, in support of the proposition that "not all agreements between States are subject to the strictures of the Compact Clause," 434 U.S. at 469, the Court quoted approvingly from *New York* v. *O'Neill*, 359 U.S. 1 (1959), which upheld a uniform law designed to achieve interstate cooperation on the attendance of out-of-state witnesses at criminal proceedings. In *O'Neill*, the Court noted that the legislation, "[f]ar from being divisive, . . . is a catalyst of cohesion," and, therefore, falls "within the unrestricted area of action left to the States by the Constitution." 359 U.S. at 6.

case is open only to a select group of states that have discerned some benefit in banding together to the exclusion of their sister states. The New England Compact not only has the effect of injuring interests in other states; it is *intended* to "redound to the benefit of [a] particular group of States [and] to the harm of others."

Thus, the absence of congressional authorization is fatal to the New England Compact under the Compact Clause of the Constitution.

CONCLUSION

The Massachusetts and Connecticut statutes at issue in this case seek to establish an exclusionary regional banking zone in defiance of constitutional principles vital to the preservation of a harmonious federal system. Congress has not consented to or authorized this unprecedented arrangement. Nor has it even begun to consider and resolve the public policy questions raised by the threatened Balkanization of the nation's banking system. Accordingly, *amicus* respectfully maintains that this Court should reverse the decision of the court below and hold that the New England Compact is unauthorized by Congress and unlawful under the Commerce and Compact Clauses of the Constitution.

Respectfully submitted,

Of Counsel:
L. EDWARD SHAW, JR.
KENT T. STAUFFER
THE CHASE MANHATTAN CORPORATION
1 Chase Manhattan Plaza
New York, N.Y. 10081
(212) 552-5441

JOSEPH A. CALIFANO, JR.*
GERALD M. ROSBERG
DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
1775 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 862-1000
Counsel for Amicus Curiae The Chase Manhattan Corporation

* Counsel of Record

February 21, 1985